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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHRISTOPHER HAYES CONATSER,

Defendant and Appellant.

A154326

(Napa County  
Super. Ct. No. CR167593)

Defendant Christopher Hayes Conatster, who is currently serving a six-year period of mandatory supervision on an eight-year split sentence, appeals an order denying his motion to dismiss two 3-year sentence enhancements imposed under Health and Safety Code section 11370.2, subdivision (c). His motion was made on the ground that due to a change in the law effective January 1, 2018, his prior drug-related convictions no longer constitute qualifying convictions under Health and Safety Code section 11370.2, subdivision (c), and that this change in the law applies retroactively. He contends the court erred in concluding that he is not eligible for relief because his judgment was final when the amendment became effective. There was no error and we shall therefore affirm the court's order denying defendant's motion.

**Background**

In 2015, defendant pled no contest to one felony count of possession of a controlled substance for sale (Health & Saf. Code, § 11378) and admitted having suffered two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (c). The trial court sentenced him to two years on the possession offense and

imposed two consecutive three-year terms for the prior convictions. The court imposed a split sentence under which the first two years were to be served in county jail and the remaining six years served under mandatory supervision. (Pen. Code, § 1170, subd. (h)(5)).<sup>1</sup> The judgment was affirmed by this court on September 30, 2016. (*People v. Conatser* (Sept. 30, 2016, A146093) [nonpub. opn.] )

Effective January 1, 2018, Health and Safety Code section 11370.2 was amended to remove the offenses for which defendant had previously been convicted from the list of offenses that qualify a defendant for the imposition of an enhancement under section 11370.2, subdivision (c). (Stats. 2017, ch. 677, § 1, eff. Jan. 1, 2018.)

On February 5, 2018, defendant filed a motion seeking dismissal of the two three-year sentence enhancements in light of the passage of Senate Bill 180. The trial court denied defendant's motion on the ground that the statutory amendment did not apply to him because his judgment was final when the amendment became effective.<sup>2</sup>

Defendant timely filed a notice of appeal.

### **Discussion**

The parties agree that the amendments to Health and Safety Code section 11370.2 made by Senate Bill No. 180 apply retroactively to actions in which the judgment is not final. (*In re Estrada* (1965) 63 Cal.2d 740, 748 (*Estrada*) [“[W]here the amendatory statute mitigates punishment and there is no saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed” so long as the amended statute takes effect before the judgment of conviction becomes final.]; *People v. McKenzie* (2018) 25 Cal.App.5th 1207, 1213 [applying *Estrada* to conclude that the amendment to Health and Safety Code section 11370.2 applies retroactively to a non-

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> Defendant also sought early termination of his mandatory supervision under *People v. Camp* (2015) 233 Cal.App.4th 461. The court denied this request on the ground that he was sentenced in conformity with his plea agreement. On appeal, defendant does not challenge the court's denial of this request.

final judgment]; *People v. Millan* (2018) 20 Cal.App.5th 450, 455 [same].) The parties disagree, however, whether defendant's judgment was final on January 1, 2018.

“ ‘A “sentence” is the judgment in a criminal action [citations]; it is the declaration to the defendant of his disposition or punishment once his criminal guilt has been ascertained.’ ” (*People v. Wilcox* (2013) 217 Cal.App.4th 618, 625.) “A judgment becomes final when the availability of an appeal and the time for filing a petition for certiorari [with the United States Supreme Court] have expired.” (*People v. Smith* (2015) 234 Cal.App.4th 1460, 1465.)

In this case, it is undisputed that as of January 1, 2018, sentence had been imposed, judgment had been affirmed on appeal, and the time for further appeal had lapsed. Nonetheless, defendant contends that the judgment is not final for *Estrada* purposes because the court retained discretion to modify his sentence during the period of mandatory supervision.

Recently, in *People v. Grzyski* (2018) 28 Cal.App.5th 799, Division One of this court held that a split sentence is final within the meaning of *Estrada* when the time for appeal has lapsed. The court explained that “Even if a trial court has authority to terminate mandatory supervision without ordering that the suspended portion of the sentence be served,” the court explained, “it does not follow that the sentence is therefore not a final judgment under *Estrada*.” (*Id.* at p. \*11.)

We reject defendant's argument that the court retained jurisdiction to modify his sentence during the period of mandatory supervision. We agree with our colleagues that the court's authority to modify the conditions of defendant's mandatory supervision did not impact the finality of the judgment for purposes of *Estrada*. Section 1170, subdivision (h)(5) authorizes imposition of a “split sentence” under which the sentence is served “partly in county jail and partly under the mandatory supervision of the county probation officer.” (*People v. Scott* (2014) 58 Cal.4th 1415, 1418-1419.) When imposing a split sentence the court imposes sentence but “suspend[s] execution of a concluding portion of the term for a period selected at the court's discretion.” (§ 1170, subd. (h)(5)(A).) “The portion of a defendant's sentenced term that is suspended pursuant to

this paragraph shall be known as mandatory supervision.” (§ 1170, subd. (h)(5)(B).) “The period of supervision shall be mandatory, and may not be earlier terminated except by court order.” (*Ibid.*) A trial court has “authority at any time during the term of mandatory supervision . . . to revoke, modify, or change the conditions of the court’s order suspending the execution of the concluding portion of the supervised person’s term.” (§§ 1170, subd. (h)(5)(B); 1203.3, subd. (a).)<sup>3</sup>

Contrary to defendant’s argument, section 1203.3 does not give the court authority to modify a sentence previously imposed by striking an enhancement. “Under the general common law rule, a trial court is deprived of jurisdiction to resentence a criminal defendant once execution of the sentence has commenced.” (*People v. Karaman* (1992) 4 Cal.4th 335, 344.) While jurisdiction to modify the sentence may be retained in the court by statute, the court’s authority is limited by the terms of the statute. (*People v. Antolin* (2017) 9 Cal.App.5th 1176, 1180; see also *People v. Howard* (1997) 16 Cal.4th 1081, 1092 [common law rule regarding retention of sentencing jurisdiction does not apply to probation decisions governed by statute.].) To the extent sections 1170, 1203.2 and 1203.3 “reserve jurisdiction to adjust the circumstances of release, such authority undoubtedly does not include the right to change the length of the original sentence. Once made, that is a sentencing decision that cannot be changed unless the court has the authority to recall the sentence under authority similar to section 1170(d).” (Couzens & Bigelow, *Felony Sentencing After Realignment* (May 2017) p. 16, at <[http://www.courts.ca.gov/partners/documents/felony\\_sentencing.pdf](http://www.courts.ca.gov/partners/documents/felony_sentencing.pdf) > [as of Nov. 30, 2018].) Modifying the conditions of mandatory supervision is not the equivalent of modifying the judgment itself.

Defendant’s reliance on *People v. Camp*, *supra*, 233 Cal.App.4th 461, 474, is misplaced. In that case, the court read section 1203.3, subdivision (b)(1)(A), as

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<sup>3</sup> The trial court also has authority to revoke or terminate mandatory supervision under section 1203.2, subdivisions (a) and (b), when it has reason to believe the conditions of supervision have been violated. (§§ 1170, subd. (h)(5)(B); 1203.2, subd. (a) & (b).) Section 1203.2 is not applicable to the present situation.

authorizing “a court to modify a defendant’s ‘sentence’ in revoking or modifying mandatory supervision.” (*Camp*, p. 471.) This comment was dicta; the court held only that a trial court has the authority under section 1170, subdivision (h)(5)(b) to terminate the defendant’s mandatory supervision early without ordering him to serve the suspended portion of the sentence in custody. (*Camp*, p. 471.) Moreover, the comment misconstrues the statute. According to the court, “section 1203.3, subdivision (b)(1)(A) expressly states that a court *may* modify a defendant’s ‘sentence’ or a ‘term or . . . condition of mandatory supervision.’ ” (*Camp*, p. 470.) That provision actually reads, “If the sentence or term or condition of probation or the term or any condition of mandatory supervision is modified pursuant to this section, the judge shall state the reasons for that modification on the record.” This subpart, like all of subdivision (b), imposes requirements on the “exercise of the court’s authority in subdivision (a).” Subdivision (a) first recites the court’s authority to revoke or modify the terms of probation and then, with respect to mandatory supervision pursuant to section 1170, subdivision (h)(5)(B), authorizes the court “to revoke, modify, or change the conditions of the court’s order suspending the execution of the concluding portion of the supervised person’s term.” Subdivision (b) does not expand the court’s authority to allow for modification of a judgment that is already final.

Accordingly, the trial court did not err in denying defendant’s motion to dismiss his enhancements on the ground that his judgment was final.

### **Disposition**

The order denying defendant’s motion to dismiss is affirmed.

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Pollak, J.\*

We concur:

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Siggins, P.J.

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Jenkins, J.

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\* Presiding Justice of the Court of Appeal, First Appellate District, Division Four, sitting by assignment pursuant to article VI, section 6 of the California Constitution.